IS COLONIZATION A CRIME?

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In a brilliant address delivered at the August meeting of the Virginia State Bar Association, Mr. Justice Brewer took as his theme "Two Periods in the History of the Supreme Court"—the period of national stability, extending from the foundation of the Government to the Civil War, and the period of national enlargement, extending from the close of that war to the present time. From the press reports it appears that the most striking portion of the address was that which referred to the recent Insular Cases, in which it was decided that the national Government has the power to acquire and hold, free from Constitutional limitations, and subject to Congressional control, territory outside the limits of the organized States. Said Justice Brewer:

"Now, I submit this inquiry. Did the candid, intelligent men who drafted this Constitution and the people who adopted it, having just finished a seven years' war to free themselves from colonial subjection to Great Britain, intend to vest in the Government they were creating the power to hold other territory in like colonial subjection? I can but look upon it as an imputation upon either the integrity or the intelligence of the framers of the Constitution that this nation should establish for other lands the same colonial subjection to relieve themselves from which had been waged such an earnest and exhausting war."

No student of current events can close his eyes to the fact that Justice Brewer is a powerful exponent of the views of a large and growing element, composed of leaders in both of the great political parties, who are resolved to teach the rising generation that our entire scheme of colonial expansion and government is a newfangled usurpation of political power, which the founders of the Republic never contemplated, and for which the Constitution does not provide. So aggressive is this element becoming, there

can be no doubt that, in the near future, the people of this country must definitely pass upon its contentions before it can be said that our present policy of maintaining territorial governments in distant dependencies is a settled element in our national life. Those who assail the advance which has so far been made rest their case upon what I believe to be two entirely arbitrary and untenable assumptions: first, that, as a matter of manifest justice, residents of Territories which are in a state of transition are entitled to all the Constitutional rights guaranteed to citizens of fully organized States; second, that, as a matter of manifest historical fact, the founders of the Republic intended to establish that condition of things. Such is the novel theory intended to be expressed by those who have recently raised the strange and meaningless cry that the "Constitution follows the flag." The purpose of this paper will be to demonstrate that the assumptions upon which that theory rests are very recent inventions, and that they have no support whatever either in the general history of the world, or in the special Constitutional history of the United States.

Those who are striving to make our present efforts at colonization odious must admit that, in the past history of the world, colonization has been the most potent instrument in widening the limits of civilization. By that means the Greeks extended their brilliant life along the shores of the Mediterranean as far as Sicily, and by that means Rome drew the British Isles within the domain of history. And, when the shores of the Mediterranean no longer marked the limits of the maritime world, when the dominion of the seas passed from the Italian seaports to the nations bordering on the Atlantic seaboard, they, in their turn, by means of colonization, added a new world to the old. The entire process is one of reproduction. The colony is planted in foreign parts under the patronage of the mother state, and when it ripens it falls off and starts a new life for itself under the rule of Turgot, who said: "Colonies are like fruits, which cling to the tree only till they ripen." In the colonization of this hemisphere the theory was that the emigrants took the mother state with them on their backs. "The notion was, where Englishmen are, there is England; where Frenchmen are, there is France; and so the possessions of France in North America were called New France, and one group at least of the English possessions

New England." And yet, during the entire process, the claim was never made, either in the ancient, mediæval or modern world, that colonists have the right to participate in the Constitution of the mother state from which they came. The most-favored members of the Athenian Alliance or Empire, even Chios or Mitylene, could not have a voice in the general direction of the Confederacy, as Greek exclusiveness rejected to the last the idea of a fusion of any large number of cities into a single body with equal rights common to all. There is nothing whatever to show that the founders of this Republic ever intended to depart from the world's past experience, so far as the government of territory outside the limits of organized States is concerned. On the contrary, we have the most conclusive record evidence made by themselves that their purpose was to acquire such territory, to hold and govern it free from the Constitutional limitations of the mother state, and subject alone to Congressional control. The fact is that this seems to have been one of the very few vital questions upon which the extremes represented on the one hand by Jefferson and on the other by Marshall fully agreed. And even when, at a later day, the acquisition of Louisiana made vital the question of the civil and political rights of the inhabitants, Gouverneur Morris, who more than any other man gave literary form to the Constitution, in a letter to Henry Livingstone said: "I always thought that, when we would acquire Canada and Louisiana, it would be proper to govern them as provinces and allow them no voice in our councils."

Jefferson was entirely in accord with Gouverneur Morris on that all-important subject. With the words of the Declaration of Independence warm upon his lips, he had no more inclination to extend the Constitution of the United States even to his brethren settled in outlying territories or colonies than Pericles had to extend the constitution of Athens to Chios or Mitylene. It never occurred to either that the principles of human right demanded or justified such an extension. The signing of the first Constitution of the United States, embodied in the Articles of Confederation, which was submitted to the States for adoption in November, 1777, was not completed until March 1st, 1781, when Maryland finally gave it her adhesion. The long delay arose out of the refusal of Delaware, New Jersey and Maryland to enter into the Confederation until the controversy was settled as to the ultimate

ownership of the great Western Territory, of which France had been dispossessed. Although deserted by her allies, Maryland refused to abandon her contention:

"That a country unsettled at the commencement of this war, claimed by the British crown, and ceded to it by the Treaty of Paris, if wrested from that common enemy by the blood and treasure of the thirteen states, should be considered as common property, subject to be parcelled out by Congress, into free, convenient and independent governments, *in such manner and at such times as the wisdom of that Assembly shall hereafter direct.*"

In that way, the new nationality became the sovereign possessor of the whole Northwestern Territory—the area of the great States of Michigan, Wisconsin, Illinois, Indiana and Ohio, excepting the Connecticut reserve, which, under the Articles of Confederation, it had no express right either to hold or govern. Notwithstanding that fact, Congress, acting under authority clearly implied, boldly entered upon the creation of that scheme of territorial government which was embodied in the Ordinance of 1784 for the government of the Northwestern Territory. In describing that famous enactment, the eminent American historian, Professor J. B. McMaster, said not long ago:

"It was our first effort at colonial government, our first attempt to rule a community not fit to become a State and enter the Union; and by it a new political institution, the Territory, was created in two grades. At the head of the committee which reported the ordinance was the apostle of liberty, the father of American democracy, the man who wrote the Declaration of Independence. If one member more than another of that committee was bound to carry out the principles of the Declaration, and seek to establish a government in strict accordance with them, that member was Jefferson. If any one man more than another could be pardoned for attempting to carry the self-evident truth to an extreme, Jefferson was that man. Yet not for a moment was he led astray by the ideals he had announced to the world as the true basis of democratic government. He and his fellow members knew well that no popular government can stand long, or accomplish much for the good of the governed, which is not carefully adjusted to the wants, conditions and intelligence of the people who are to live under it. The plan presented and adopted, therefore, did not contain one vestige of self-government till there were five thousand free white males living in the Territory, and this in spite of the fact that the great majority of them would be citizens from the seaboard States and well accustomed to self-government. . . . The clear distinctions between a State and a Territory, thus drawn at the very outset of our career, and the principles then established,—that Congress

was free to govern the dependencies of the United States in such a manner as it saw fit; that the government it granted need not be republican, even in form; that men might be taxed without any representation in the taxing body, stripped absolutely of the franchise, and ruled by officials not of their own choice,—have never been departed from, and have often been signally confirmed."

After the division of the Louisiana purchase, a part, corresponding very nearly to the present State of Louisiana, was named the "Territory of Orleans." To the new Territory thus formed an oligarchal form of government was given by Congress, but little in advance of that devised in the first instance by Jefferson for the Northwestern Territory. Even the right of trial by jury was conceded with a serious restriction.

When, for a second time, our domain was expanded by the acquisition of Florida, Congress, ignoring the idea that the Constitutional guarantees should be extended to a Territory, gave to the new possession in 1822 substantially the same form of government provided for Orleans in 1804. The time had now come for the Supreme Court of the United States, speaking through Chief-Justice Marshall, to determine whether or no the colonial or territorial system devised by Jefferson for the government of Territories beyond the limits of the organized States vested in their inhabitants the right to participate in the Constitutional guarantees provided for citizens of the United States. The precise question was whether the tenure of the Territorial judges, elected for four years, was regulated by the clause which provides that "the judges of the Supreme and inferior courts shall hold their offices during good behavior." At last Marshall and Jefferson were at one. The former, with the concurrence of all his associates, declared that the clause of the Constitution in question had no application to a Territory whatever. He said:

"These courts, then, [Territorial courts] are not Constitutional courts in which the judicial power conferred by the Constitution on the General Government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the Government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States."

When, for a third time, our domain was widened by the acquisition, in 1848, under the Treaty of Guadalupe-Hidalgo, of a vast region inhabited by people of mixed races, with laws and customs

unlike our own, the problem of Territorial government became entangled with an effort to extend the limits within which slavery could be maintained. In the course of a debate that ensued on an amendment to a certain bill offering to extend the Constitution and certain laws of the United States over the proposed Territories of Utah and New Mexico, a scene occurred of which Mr. Burton gives us the following description:

"The novelty and strangeness of this proposition called up Mr. Webster, who repulsed as an absurdity and as an impossibility the scheme of extending the Constitution to the Territories, declaring that instrument to have been made for States, not Territories; that Congress governed the Territories independently of the Constitution and incompatibly with it; that no part of it went to a Territory but what Congress chose to send."

In 1879, in the case of the First National Bank of Brunswick *vs.* County of Yankton, 100 U. S., 129, the Supreme Court, without a dissenting voice, declared that:

"The Territories are but political subdivisions of the outlying dominion of the United States. They bear much the same relation to the General Government that counties do to States, and Congress may legislate for them as States do for their respective municipal organizations. The organic law of a Territory takes the place of a constitution, as the fundamental law of a local government. It is obligatory on and binds the Territorial authorities; but Congress is supreme, and, for the purpose of this department of its governmental authority, has all powers of the people of the United States, *except such as have been expressly, or by implication, reserved in the prohibitions of the Constitution.*"

In the case of Downes *vs.* Bidwell, 182 U. S., 244, the Supreme Court, speaking through the weighty words of Mr. Justice Brown, simply reiterated that historic and unassailable doctrine, when it said:

"That the power over the territories is vested in Congress without limitation, and that this power has been considered the foundation upon which the Territorial governments rest, was also asserted by Chief-Justice Marshall in McCulloch *vs.* Maryland. . . . To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between such prohibitions as go to the very root of the power of Congress to act at all, irrespective of time or place, and such as are operative only 'throughout the United States' or among the several States. Thus, when the Constitution declares that 'no bill of attainder or *ex post facto* law shall

be passed,' and that 'no title of nobility shall be granted by the United States,' it goes to the competency of Congress to pass a bill of that description. . . . Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of States or be permitted to form independent governments,—it does not follow that, in the mean time, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled, under the principles of the Constitution, to be protected *in life, liberty and property.*"

In the light of that splendid and humane exposition of the nature of our colonial or territorial system which Jefferson devised, and which Gouverneur Morris, Marshall and Webster approved, how can any one suggest that it is an imputation upon either the integrity or intelligence of the fathers of the Republic to assume that they intended that we should perpetuate it as a part of our inevitable and irresistible growth? Those who are attempting to maintain that this nation is a sterile monster, incapable of reproducing itself after the manner of all other civilizing nations, cannot venture to appeal either to the past history of colonization in general or to its special history as involved with our own.

Encouraged and sustained as we are by the history of the past, and by the precept and example of the fathers, why should we shrink from the mighty part we are predestined to play in that Pacific world which is to offer an almost boundless domain for our commercial activity? As early as 1852, William H. Seward, standing in the Senate of the United States, swept the horizon of the future, when in these bold and prophetic words he said: "Henceforth, European commerce, European politics, European thought and European connections, although actually becoming more intimate, will, nevertheless, relatively sink in importance; while the Pacific Ocean, its shores, its islands and the vast region beyond will become the chief theatre of events in the world's great hereafter." At that time, Louisiana, Arkansas, Texas, Missouri, Iowa and California were the only States west of the Mississippi; California was then but a string of mining-camps, and San Francisco a crude frontier town; west of the Mississippi there were then but eighty miles of railway and no telegraph lines; steamships were still a curiosity in many parts of the Pacific; Mexico, Central America and the Pacific states of South America, which

had emerged successfully from their wars of independence with Spain, were still hampered by internal dissensions; Hawaii was little known except as the place where Captain Cook was killed; the Australian colonies were just entering upon their career so rich with promise of wealth and commerce; China had been recently forced at the cannon's mouth to open a few of her ports to foreign trade; Japan was still a sealed mystery; Alaska and the Siberian coast of Asia, except for the adventurous fur-traders, were in the undisturbed possession of the seal and the Eskimo. Since then, what a mighty transformation! Mr. Seward could hardly have dreamed that his prophecy was so soon to be fulfilled. By a master-stroke of statesmanship he led the way for us by purchasing Alaska for a song. Then the Hawaiian Islands were annexed, and soon the Philippines came through a process of causation which swept Cuba away from Spain, in order that she might become the fortress without which, as Captain Mahan says, we cannot defend the Panama Canal. The piercing of the Isthmus is the only problem that remains, and who can doubt that our indomitable and far-sighted President will make it possible for that dream to be realized? When our ships of commerce carry the flag through the new waterway from the Caribbean Sea to the Pacific, it will be followed by one of the three great navies of the world, an institution far more potent in foreign parts than the Constitution. The Southern States bordering upon the Gulf of Mexico, which are now entering upon a career of unprecedented prosperity, will be benefited by the change far more than any other part of the Union. Certainly, their citizens should not join in the cry against a natural and inevitable process of expansion because it involves the application to dependencies in the Pacific of a system of territorial or colonial government by Congress which was devised by Jefferson and approved by Marshall.

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